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In the Supreme Court of the United States

OCTOBER TERM, 1978

RAWLIN L. STOVALL AND AMERICAN CASH COMMODITIES OF MISSOURI, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 14) is reported at 590 F. 2d 338.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1979. A petition for rehearing was denied on March 1, 1979. The petition for a writ of certiorari was filed on March 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion by ordering restitution pursuant to 18 U.S.C. 3651.

STATUTE INVOLVED

18 U.S.C. 3651 provides in pertinent part:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> * * * * *
>
> While on probation and among the conditions thereof, the defendant—
>
> > May be required to pay a fine in one or several sums; and
> >
> > May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had * * *.

STATEMENT

Following a jury-waived trial in the United States District Court for the Northern District of Illinois, petitioner Stovall was convicted on 25 counts of mail fraud, in violation of 18 U.S.C. 1341, and on one count of making a false statement to a grand jury, in violation of 18 U.S.C. 1623. Petitioner American Cash Commodities (American) was convicted on 19 counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Stovall was sentenced to concurrent five-year terms of imprisonment on each count. Execution of the sentence was suspended, however, and Stovall was

placed on five years' probation subject to the condition that he make restitution to the victims of the fraud. He was also fined $30,000. Petitioner American was also placed on five years' probation subject to the same condition, and was fined $18,000 (Pet. App. 2, 12, 13; Sentencing Tr. 15, 16).

1. On September 6, 1973, petitioner Stovall and petitioner American (Stovall's wholly-owned corporation) were indicted for mail fraud. The indictment alleged that petitioners defrauded more than 3,000 investors of approximately $6,000,000 by misrepresenting that they were trading commodities on the victims' behalf.[1] Petitioners allegedly received funds from clients for commodities trading and sent them false and misleading periodic statements summarizing transactions and profits earned for their accounts.

Contemporaneously with the filing of the indictment, several of the defrauded investors filed civil actions in the United States District Court for the Northern District of Illinois. Those actions were consolidated before Judge Thomas R. McMillen as a single class

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[1] The charging count of the indictment (Count 1, para. 5) alleged that petitioners

> devised and intended to devise a scheme and artifice to defraud, and for obtaining money and property from [their] clients by means of false and fraudulent pretenses, representations and promises * * *.

This allegation was incorporated by reference in each subsequent count. The indictment defined the term "client" as the "approximately 3000 individuals, partnerships, estates, trusts associations and corporations who deposited and caused to be deposited money totaling approximately $6 million with defendants RAWLIN L. STOVALL and AMERICAN CASH COMMODITIES OF MISSOURI, INC." (Count 1, para. 4(a)).

action (Pet. App. 15; *Patterson* v. *Stovall*, 528 F. 2d 108, 110 (7th Cir. 1966)). At the time the civil suits were filed, petitioners had $6,800,000 of the investors' funds on deposit at the Continental Bank of Chicago. The bank was joined as a defendant, and during the litigation the fund remained on deposit in an interest-bearing account (528 F. 2d at 110). On February 6, 1974, petitioners and a number of the plaintiffs presented a proposed settlement agreement to Judge McMillen for his approval. In summary, the agreement provided that the fund on deposit at the bank would be divided into two smaller funds. The first, "Fund A," would consist of all the money on deposit at the bank except for $1,000,000. Fund A would be distributed on a pro rata basis to all investors who desired to participate in the out-of-court settlement. "Fund B," which would consist of the remaining $1,000,000, would be used to compensate investors who chose to litigate their claims, and to pay assorted other claims, including claims of non-investor creditors, tax obligations, attorneys' fees, and any fines that might be imposed in the criminal action. The agreement further provided that any amount remaining in Fund B after those disbursements would revert to petitioner American. On February 20, 1975, Judge McMillen overruled the objections of several claimants to this proposal. He then approved the settlement agreement and authorized distribution of the funds in accordance with it (528 F. 2d at 100-111 & n.2).[2]

2. Prior to Judge McMillen's approval of the proposed settlement agreement, petitioners negotiated a

[2]The court of appeals held that the judge in the civil action did not abuse his discretion in approving the settlement agreement. *Patterson* v. *Stovall*, *supra*, 528 F. 2d at 112-115.

plea agreement with the government. It provided in substance that petitioner Stovall would plead guilty to the false statement count and nolo contendere to the mail fraud counts, and that American would similarly enter nolo contendere pleas to the mail fraud counts under which it was indicted. Additionally, petitioners agreed "[to make] the fullest possible restitution of all monies received * * * and [of] all interest earned * * *" (Jan. 14, 1974 Tr. 17). In return, the government agreed not to recommend incarceration for petitioner Stovall (*ibid.*).

Petitioners entered the pleas contemplated by the plea agreement before Judge Abraham L. Marovitz. During that proceeding Judge Marovitz was apprised of the terms of the proposed civil settlement agreement by attorneys for the investors (Jan. 14, 1974 Tr. 3, 4, 5). He also reviewed the terms of the plea agreement and reminded petitioner Stovall that "the government's position is that the fullest possible restitution should be made to all those people" (*id.* at 7-8). Judge Marovitz then continued sentencing for a month pending consummation of the proposed settlement agreement in the civil action before Judge McMillen (*id.* at 19).

During the sentencing proceeding conducted on February 28, 1974, Judge Marovitz reviewed with the parties the terms of the civil settlement agreement and remarked that there was a good chance that Fund B would be left substantially intact due to the limited number of claimants participating in the litigation (Sentencing Tr. 8-9). He expressed his intent "to use whatever monies are left in that fund to pay these creditors as much as I possibly can * * *" (Sentencing Tr. 23). Petitioners' attorney also stated (*id.* at 5-6):

> I have explained to Mr. Stovall, following our discussions, that this Court will maintain jurisdiction to review the terms of the settlement and also

> particularly the contents of Fund B under the settlement at the end of the civil litigation and that this Court will determine * * * whether a fine or other conditions should be imposed with respect to that Fund B settlement as to Mr. Stovall and he understands it, your Honor.

When questioned by the court, petitioner consented to such action and agreed with the substance of his counsel's statement (*id.* at 6). The trial judge then imposed sentence but, after obtaining petitioners' concurrence, he suspended imposition of fines and restitution until final determination of the amount remaining available in Fund B after payment of all judgments and other claims (*id.* at 10, 14, 15-16).

The civil litigation before Judge McMillen was not concluded until September 1977. Subsequently, Judge Marovitz entered his final order determining the nature and extent of restitution. Judge Marovitz found that despite the disbursements from Fund A, the defrauded investors still had suffered a collective loss of $1,722,597. Because Fund B still contained $1,090,698 at the conclusion of the civil litigation, Judge Marovitz directed that the

> defendants reduce the unpaid "actual loss or damages" by making restitution to the victims of the entire amount remaining in Fund B after the payment of all expenses * * * fines * * * and * * * a reasonable fee to the * * * [banks]. The restitution is to be made in a manner such that each of the victims receives an equal proportionate return on his initial deposit with the defendants. [Pet. App. 10, 11; footnote omitted.]

3. The court of appeals held that Judge Marovitz had acted within his authority under 18 U.S.C. 3651 in ordering restitution to the victims of the fraud as a condition of probation. The court noted that in affirming the approval of the civil settlement agreement, it had specifically held that Judge Marovitz "'still retains the power to order restitution to depositors from funds remaining with Stovall or his company in Fund "B"'" (Pet. App. 16, quoting from 528 F. 2d at 111). The court found no ground for upsetting the district court's determination that all 3,197 investors were "aggrieved parties" within the meaning of 18 U.S.C. 3651, to whom restitution could appropriately be ordered in the criminal case.

ARGUMENT

1. Petitioners contend (Pet. 19) that it was improper for the trial judge to order restitution to each of the 3,197 victims of their fraudulent scheme, and that he should have limited the restitution order to defrauded investors specifically named in the indictment.

However, Section 3651 authorizes the trial court to impose, as a condition of probation, the requirement that the defendant "make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had." The mail fraud counts, to which petitioners entered nolo pleas, each alleged that there were more than 3,000 victims of the scheme, and that those victims were collectively defrauded of more than $6,000,000. Prior to the entry of the restitution order, the government supplied the court with the names and addresses of the victims, and the court accepted the government's uncontroverted representation that the list was identical with the list of approved claimants participating in the civil case (Pet. App. 8-9). Under these circumstances, it was entirely proper for the court to

rule (Pet. App. 9) that the actual victims of the fraudulent scheme charged in the indictment were "aggrieved parties" entitled to restitution under the statute. See generally *United States* v. *Follette*, 32 F. Supp. 953, 955 (E.D. Pa. 1940); see also *United States* v. *Boswell*, 565 F. 2d 1338, 1342 (5th Cir. 1978), cert. denied, No. 77-1466 (Oct. 2, 1978).

The fact that the individual victims were not specifically named in the indictment or alleged to have mailed checks to petitioner is of no moment. The identities of individual mail fraud victims are not essential to a mail fraud indictment; the indictment need only identify a victimized class. *Butler* v. *United States*, 317 F. 2d 249, 256, & n.9 (8th Cir.), cert. denied, 375 U.S. 836 (1963). See also *United States* v. *Unger*, 295 F. 2d 889, 891 (7th Cir. 1961). Moreover, the mail fraud statute does not require that all of the funds involved in the fraudulent scheme be sent through the mails. It is only necessary that the mails be used in furtherance of the fraud. See, *e.g.*, *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954).

The authorities on which petitioners rely (Pet. 9, 11) are not pertinent here. In *Karrell* v. *United States*, 181 F. 2d 981 (9th Cir. 1950), the court held that it was improper to condition probation upon restitution for offenses of which the defendant was acquitted. In *United States* v. *Buechler*, 557 F. 2d 1002, 1007-1008 (3d Cir. 1977), and *United States* v. *Follette*, *supra*, the courts ruled that restitution could not be ordered in an amount exceeding that involved in the offenses of which the defendant was convicted. And in *United* States v. *Clovis Retail Liquour Dealers Trade Association*, 540 F. 2d 1389 (10th Cir. 1976), the court held that restitution could not be ordered to persons

who were not "aggrieved parties * * * by the offense for which the conviction was had." Here, by contrast, petitioners were convicted of defrauding the persons to whom they were ordered to pay restitution, and the amount of the restitution was based on the loss suffered by the victims as a result of that fraud.[3] In any event, as the trial judge stated, "in this case defendants individually and through their counsel have consented by their representations to this Court to make restitution to all their victims and not just those victims who sent their checks through the mail" (Pet. App. 9-10). If this condition of probation were not enforced, the plea agreement that resulted in a recommendation that petitioner Stovall not be incarcerated would be substantially undermined.

2. Petitioners also contend (Pet. 13, 17, 19) that the restitution order contravenes the terms of the civil settlement agreement because the order requires

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[3]Petitioners' reliance (Pet. 12) on *United States* v. *Hoffman*, 415 F. 2d 14 (7th Cir. 1969), is equally misplaced. In *Hoffman*, the restitution order was remanded for revision because "the 'aggrieved parties' portion of §3651 is not identified * * *, the 'actual damages or loss caused' is not fixed nor is the sum definite or yet determined with exactitude (*id.* at 22)." Here, by contrast, the identities of all the aggrieved parties, as well as the individual and cumulative loss, were fully established prior to entry of the restitution order. The only unknown factor that delayed entry of the order was the amount remaining in Fund B after completion of the civil litigation that was available for pro rata distribution to the victims. See *United States* v. *Landay*, 513 F. 2d 306, 308 (5th Cir. 1975).

Petitioners also claim (Pet. 15) that the delay between entry of the plea and the order directing restitution constituted a denial of "equal protection of Section 3651." Yet petitioners fail to suggest any prejudice resulting from this delay and, more importantly, they assented to exactly such a delay upon questioning by the trial judge (Sentencing Tr. 16).

payments from Fund B to claimants who previously accepted partial settlement from Fund A and who agreed to release petitioners from further civil claims. Thus, petitioners argue, the restitution order "go[es] beyond what the parties had agreed to and intended" (Pet. 19).

Initially, we note that this claim is factually inaccurate. As the court of appeals recognized in *Patterson* v. *Stovall*, *supra*, prior to the approval of the civil settlement agreement, Judge Marovitz made it clear to petitioners that the fullest possible restitution was contemplated by the government as a condition to its recommending probation (Jan. 14, 1974 Tr. 7-8).[4] Thereafter, at the sentencing hearing on February 28, 1974, Judge Marovitz stated that it was his intention to look to Fund B as the source of restitution (Sentencing Tr. 9-10, 23). Stovall acquiesced in the exercise of the court's restitution power with respect to any residuum in the fund following the payment of the civil judgments (Sentencing Tr. 6). Thus, prior to approval of the settlement agreement, petitioner Stovall fully understood that Fund B would be used, to whatever extent necessary, to make the defrauded investors whole. Consequently, the restitution order did not contravene the expectations of the parties to that agreement. *Patterson* v. *Stovall*, *supra*, 528 F. 2d at 111.[5]

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[4]Hence there is no substance to petitioners' claim (Pet. 18) that the trial judge was unaware of the scope of the pretrial negotiations. Indeed, his statements show that he had been apprised of the scope of the agreement during pretrial conferences (Tr. 5-8). A copy of the written agreement was furnished to Judge Marovitz at the guilty plea hearings, and he reviewed its terms with petitioner Stovall at that time (Sentencing Tr. 16-17, Gov't Exh. 2).

[5]Petitioners certainly had no reasonable expectation that Fund B would be repaid to them. Fund B was created for the very purpose of providing restitution. The money was held under order of the court to pay defrauded investors who opted out of the class action litigation, to pay the IRS certain outstanding tax liabilities, and to make restitution to "others" (Pet. App. 21-22). Moreover, the notice sent to the settling class members stated that Fund B would be available to satisfy "any fines imposed against defendants in the criminal proceeding before Judge Abraham L. Marovitz" (Pet. 6).

In any event, the restitution order is not limited by the terms of the civil settlement; the terms of the restitution order are subject only to the trial judge's independent sentencing discretion. As the court held in an analogous context in *Gross* v. *United States* 228 F. 2d 612, 615 (8th Cir. 1956):

> [T]he determination by the State Court that [defendants] * * * were not entitled to civil judgment against Gross personally is no help to him in the criminal proceedings in the federal court. The judgment of the State Court in the civil action did not, and could not, absolve Gross of criminal liability for the offense of which he was convicted or deprive the federal court of its power to deal with that offense according to federal law. Having been convicted, it was for the federal court to impose sentence and to determine the terms and conditions of probation if probation was granted. The court, by Section 3651 of Title 18 U.S.C.A., could require Gross to "make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which the conviction was had."

certain claims to civil damages as a condition of the civil settlement does not alter their status as "aggrieved parties" victimized by a criminal scheme within the meaning of the probation statute.[6]

3. Petitioners' final contention (Pet. 21-22) is that the restitution order constitutes an excessive fine in violation of Eighth Amendment. Petitioners make no legal argument to support this claim and it is clear that the restitution order in this case was a particularly appropriate punishment for the offense committed. The effect of the order is to divest petitioners of funds that are directly traceable to their fraudulent scheme and to restore them, insofar as possible, to the victims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1979

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[6]Petitioners advance the related argument (Pet. 20-21) that the restitution order violates Fed. R. Evid. 410, which excludes evidence of nolo contendere pleas in civil proceedings. That rule is inapplicable here because the restitution order was not the result of the use of a nolo plea in a civil action. The restitution order was an integral part of the sentence imposed following petitioners' nolo plea in the same criminal proceeding.

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